BACK TO THE CONSTITUTION.

LAW was long ago defined as "a rule of action prescribed by the *supreme power* in the state, commanding what is right, and prohibiting what is wrong." Which is the body in this country that has the last supreme word in legislation? Under our form of government we have an executive, a legislative and a judicial department. The theory taught in the law schools is that each of these is separate and distinct, and that neither can interfere with the other. Laying aside preconceived opinions and deceptive forms of expression, what is the real government which we have?

The legislative is understood to be the lawmaking body, as its name imports. If so, it should be the supreme power here, as in England. In what ways do the Constitution of the United States and the constitutions of the states place any restrictions upon that body? According to the federal Constitution, and that of nearly all the states, there is only one restriction that another department can place upon the lawmaking body, and that is that the executive can interpose his veto upon any legislation which does not seem good to him, but the Constitutional Convention did not see fit to make this an absolute veto. For that would have placed the supreme power in the executive. The executive was not given the last word, but it was provided that by a certain vote, which is two-thirds in the federal Constitution, and varies in the different states, the veto can be overruled by the lawmaking body, if it adheres to its views. This is in accordance with the theory of our government, which is that the lawmaking body is one of restrictions, that is that it represents the people and has all power that is not denied it by the organic law, whereas, the executive and judicial are grants of power and have no authority except that conferred by the Constitution. This is the statement made by Black [1] and sums up correctly the analysis of our state and

[1] Black, Constitutional Law, § 100.

federal constitutions, as they are written. In the federal government, which is not an original sovereignty, but the creation, after the Revolution, of the states, the authority of the federal lawmaking body is also a grant of power, for it has, or correctly should have, no powers except those expressly conferred or necessarily inferred from those that are given.

Now as to the executive (both state and federal) its only powers are those which are expressly given or derived by necessary inference from those that are conferred. The only authority given this department to interfere with the others in any way is the veto already mentioned, and that is not absolute, but subject to be overruled by a legislative vote. In four states—Rhode Island, North Carolina, West Virginia and Ohio—the governor was even denied any veto power, though in some of these in later years it has been conferred.

As to the judicial department the power of the executive over it was in the appointment of the judges. This at first was very general, but now the number of states in which they are appointed by the governor with the consent of the Senate has been reduced to seven. The control of the judiciary department by the legislative was made more complete, in that in those states where the governor appoints, the upper house can affirm or reject his nomination, and in all of them the legislative department has supervision of the conduct of the judges and can remove them by impeachment. In three of them—Massachusetts, New Hampshire and Rhode Island—the legislature, as in England, can remove the judges without trial, by a majority vote.

It may be mentioned here that the common idea that the judges in England hold absolutely and for life is a mistake. Up to the Revolution of 1688 they held at the pleasure of the king, who could remove any judge at any time without a trial. Since 1688 the judges in England, as in the three American states above named, hold at the pleasure of the legislative department, which can remove them, as the king formerly did, at will and without trial.

This being the status of the other two departments of the government as expressed by the organic law, what is the place

contemplated for the judiciary department, taking the constitutions as they are written? There was given to the judicial department no authority whatever over the other two departments of the government. There was not conferred on it, as upon the executive, any veto over the action of either of the other two departments, not even the suspensive veto conferred on the executive. Its members were originally appointed in all the states by the executive, save in those in which such appointment was subject to confirmation by the legislative department and a few states in which the judges were elected by the legislature. It was thus the creature of one, or the other, or of both the other departments jointly, and the members of the judiciary were made removable, as already said, by the legislative department, while in three of them they still hold at the pleasure of the legislature. In the federal government all the judges of the circuit and district courts hold subject to the right of Congress to legislate them out of office at any moment. In 1802, sixteen circuit judges were thus legislated out of existence by Congress, and at sundry times since district courts have, in like manner, been abolished. As to the federal Supreme Court, it holds its appellate jurisdiction "with such exceptions and under such regulations as Congress shall make." [2] Indeed as to the Reconstruction Act, Congress enacted [3] that the courts could issue no writ to construe the validity of such statutes, and the court held that it could issue none.[4] The United States judicial department, therefore, is the creature of the legislative department, which from time to time can increase or diminish the number of the judges inferior to the Supreme Court. The number of judges on the federal Supreme Court is not fixed by the Constitution, but by Congress, which from time to time has increased or diminished the number when it thought the public interest demanded; for instance, when it was thought desirable to change the ruling of the court as to the Legal Tender Act.

The court being the creature of the legislature and subject to it for the extent of its jurisdiction and for its existence—to a large degree—whence comes it that the court has been

[2] United States Constitution, Art. III, § 2.
[3] Act 27 Mar. 1868.
[4] Ex parte McCardle, 74 U. S. (7 Wall.) 506.

exercising the supreme power in our government, i. e., the last word in legislation?

There is certainly no express authority for "judicial supremacy" or the "judicial veto," by which that department assumes the irreviewable and therefore the absolute supremacy over the other two departments. There is not a line in the constitution of any state or in the federal Constitution to authorize it. If there were it would only be necessary to point to the words and end all debate. There would be no necessity for sophistical argument and we would be saved the absurd spectacle of attempting to support the authority of the court upon the fact that some other court, at some other time, had made the same assertion. The former assertion is as groundless as one made now, unless the authority can be found in the Contitution.

It would be very strange indeed if any constitutional convention had conferred the last and ultimate power of sovereignty upon a majority of a board of appointive judges, an authority which was denied to the legislature by the suspensive veto given the executive; and when it had denied an absolute veto to the executive. Yet the judiciary was the creature of the other two departments until in more recent years (in a majority of the states, but not yet in the federal government) the judges have had the dignity conferred upon them of a direct mandate from the people by election at the ballot box. It may be noted also that this change from an appointive to an elected judiciary was brought about as a check upon the irreviewable and irresponsible power assumed by the courts of setting aside the action of the legislative, approved by the executive, department.

It would consume too much space to discuss the assumption of this power by the state courts, as it has been more flagrant in some states than in others. Latterly there has been a further curb sought to be imposed upon the assertion of this supreme power in the courts by the adoption of the "Recall of the Judges," in the state constitutions in eight states. Those who, like the writer, do not think the "Recall of the Judges" advisable, may well consider the fact that a free people will not willingly consent that the action of their duly elected representa-

tives empowered to make their laws, and of their duly elected executive, shall be brushed aside by a bare majority of a board of lawyers without any authority conferred in the Constitution.

Have the courts assumed this irreviewable power and asserted for a majority of the court an infallibility which they have denied to the minority of the court, and to the other two departments of the government?

Taking the federal court as an example a few instances will make reply. Not long after the federal Supreme Court was created—and it will be remembered that it was created and its jurisdiction fixed by an act of Congress, the Judiciary Act of 1789, and not by the Constitution—that court haled a sovereign state before it and passed sentence in Chisolm *v.* Georgia.[5] Immediately the people took the alarm and the Eleventh Amendment was passed to prevent the repetition of the sight of a sovereign state being brought into court at the suit of a private individual. It was fortunate that this was done, for otherwise the docket would have been crowded since with actions by the American Tobacco Co., the Standard Oil Co., and various railroad companies, bringing into court the states whose legislation was not acceptable to those great aggregations of wealth.

The next assumption of power was in Marbury *v.* Madison.[6] John Marshall was secretary of state. In January, 1801, he was appointed chief justice and qualified as such and took his seat on the bench January 30th, 1801, still retaining however his position as secretary of state. President John Adams having been defeated for reëlection, at midnight on March 3rd, John Marshall as secretary of state was signing and sealing commissions when, as the clock struck the hour of 12, Levi Lincoln (as Parton tells us), with President Jefferson's watch in hand, forbade Secretary of State and Chief Justice Marshall to deliver the commissions then upon the table already signed. Among them was one to Marbury as justice of the peace of the District of Columbia.

Soon thereafter there was brought before the Supreme Court, of which Marshall was still chief justice, a proceeding to compel

[5] 2 Dall. 419.

[6] 1 Cranch 137.

Mr. Madison, the new secretary of state, to deliver to Marbury the commission which Marshall himself had signed while occupying the double position of secretary of state and chief justice.

Instead of declining to sit in judgment upon his own act, Marshall as chief justice wrote a long decision in which he asserted that the courts had the power to set aside an act of Congress, but wound up finally with dismissing the proceeding upon the ground that the court had no jurisdiction to issue mandamus, as the act of Congress had not conferred such power. Thus, in an *obiter dictum,* this vast and irreviewable power, which places in a majority of the Supreme Court the ultimate sovereignty of the nation, became a precedent. It was known that if the court had directed the writ to issue, Mr. Jefferson would not have obeyed it. By announcing the doctrine and refraining from any exercise of authority under it, the powerlessness of the court was veiled, while its assertion of supremacy was distinctly made. Later when Chief Justice Marshall in another case did assert the power to issue a writ of ejectment in derogation of a statute of Georgia, Andrew Jackson pithily said, "John Marshall has made his decision, has he? Now let us see him execute it." It was never executed and has remained as so much blank paper. The evil from the assertion of the doctrine of ultimate supremacy of the courts has, however, abided with us.

It was not again asserted as against any act of Congress, however, for fifty-four years, and then in the Dred Scott case.[7] The criticism of that decision by Abraham Lincoln was sharp and shrewd. That decision, probably more than anything else, made the great Civil War inevitable, and brought in its train the enactment of the Thirteenth, Fourteenth and Fifteenth Amendments.

We can not overlook the fact that the Supreme Court, in reaching out for more power, held in 1842 that a corporation was a citizen of the state which had created it.[8] Up to that time the court had uniformly held that a corporation was not a citizen within the meaning of the "diverse citizenship" clause

[7] Dred Scott *v.* Sandford, 19 How. 393.

[8] Louisville, C. & C. R. Co. *v.* Litson, 2 How. 497.

of the Constitution. The result of this "change of front" was that corporations have brought their cases in the federal courts, in overwhelming numbers before life-tenure, appointive judges, most of whom have been trained in the employment of corporations. As the president of one great railroad company said when he defied a state statute regulating its rates, "the federal courts are the haven and home of corporations."

Later on we had another spectacle. The legislature elected by the people of New York, in the discharge of the police powers resident in every state government, passed an act restricting the hours of labor of bakers subjected to excessive heat in their trade. The highest court in New York promptly held that the people of the state could thus protect the health and the lives of its laborers.[9] The case was carried into the Supreme Court of the United States, and there, by a vote of five infallible judges against four fallible judges, the powers of the state were set aside and it was held that the great state of New York could not thus protect the lives and health of its laborers because it would interfere with the "liberty of contract."[10] The reason given was worse even than the usurpation of authority. It was an insult to the intelligence of the public, for everybody knew that these bakers were not seeking to vindicate the liberty of contract, but were asking to be protected in their lives and health. The decision of the court was in truth based upon unwillingness to curb the power of the employer over the employee.

Further back we had been treated to the spectacle in the Dartmouth College case[11] of the court holding that the charter of a corporation was not a privilege but a contract, and therefore irrevocable, with the sequence that if a corrupt legislature could be induced to grant a charter, no subsequent honest legislature could revoke it. There would be no place left for the people to control their own government. To meet this condition the people of the several states promptly made amendments to their constitutions, by which it was provided that charters of all cor-

[9] Lochner *v.* New York, 177 N. Y. 145.
[10] Lochner *v.* New York, 198 U. S. 45.
[11] Dartmouth College *v.* Woodward, 4 Wheat. 518.

porations granted thereafter should be subject to change, modification or repeal at the will of the legislature. It was thus that the people were forced to regain their control over their creatures by nullifying the decision of the courts.

For one hundred years the court had held an income tax constitutional. By this means, indispensable aid had been given to the party of the union in carrying on the Civil War. But those who were called upon to pay the income tax, the multimillionaires and great corporations, again presented a case calling in question the validity of the action of Congress. The Supreme Court, following the precedents from the foundation of the government, but only by a bare majority, again affirmed the power of Congress. Soon thereafter one of the majority judges, having received possibly a wireless intimation of the views of the thirty-nine men who signed the Constitution at Philadelphia in 1787, let it be known that he had experienced a change of heart. A petition for rehearing was granted and then by another vote of five infallible judges against four fallible judges (with a change of personnel however) the act of Congress was held unconstitutional, though it had been passed by an almost unanimous vote in both houses of Congress and had been approved by the president.[12]

The result of this astounding change was that more than $100,000,000 of taxes annually were transferred from those best able to pay them and upon whom Congress, with the approval of the president had placed them, and were imposed upon the toiling masses who were already overtaxed. The people of the union would not stand for this, and again a constitutional amendment was passed and finally adopted. But in the meantime it is estimated that more than $2,000,000,000 were levied upon the producers of the country to the exemption of the great corporations and of the multimillionaires upon whom Congress in the discharge of its duties and powers had seen fit to lay it.

Other instances of this abuse of irresponsible power by the courts could be cited, in both the federal Supreme Court and many of the state courts. But it should go without saying that

[12] Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601.

irresponsible and irreviewable power is always tyranny. Even if its effects are not always as evil as in the cases thus cited, it is intolerable because it is in contradiction of the will of the people, upon whom we boast that our government rests: "All power proceeds from the people and should be exercised for their good only."

Not only such power was not given to the judiciary in any constitutions, state or federal, but in the Convention at Philadelphia there was an attempt to put it in the United States Constitution. It was voted down, though the clause was brought forward by James Madison, afterwards president of the United States, and by James Wilson, afterwards a member of the United States Supreme Court. That Convention sat with closed doors, with its members sworn not to communicate any of its proceedings to their constituents and a vote to destroy its journal was prevented only by a bare majority. That journal was not made public for forty-nine years, and we now know from it that this proposition that the judges should pass upon the constitutionality of acts of Congress was defeated four times: i. e., first on June 4th, 1787, receiving at that time the vote of only two states. It was renewed no less than three times; i. e. on June 6th, July 21st, and, finally, for the fourth time on August 15th, and at no time did it receive the vote of more than three states. On this last occasion (August 15th) Mr. Mercer thus summed up the thought of the Convention: "He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made and then to be incontrovertible."

The doctrine that the courts can set aside an act of the legislature has never obtained in England, which has no written constitution, nor in France, Germany, Holland, Belgium, Denmark, Austria, Norway and Sweden, nor in any other country that has a written constitution. Its assertion in this country has not therefore even the "tyrant's plea of necessity." The rest of the world have gotten along very well without it.

The courts have attempted only once in England to assert a right to set aside an act of Parliament and then Chief Justice

Tressilian was hanged and his associates exiled to France, and hence subsequent courts have not relied upon it as a precedent.

Of course there have been expressions at times in the courts of England criticising acts of Parliament—generally with great modesty, but sometimes going to the extent of saying that they were not valid—but this never extended beyond an expression of disapproval, for no court in England since Tressilian's day has refused to obey an act of Parliament.

Prior to the American Revolution the acts of our colonies were sent home to England, where they were allowed or disallowed by the Privy Council, for in this way the mother country held its control over the colonies. After the acknowledgment of the independence of the thirteen colonies, and before our federal convention met at Philadelphia, the courts of four states—New Jersey, Rhode Island, Virginia and North Carolina —had assumed to themselves the power formerly exercised by the Privy Council in England. This met with immediate and strong disapproval, and in Rhode Island the judges were "dropped." These decisions were well known to the members of the convention at Philadelphia. Mr. Madison and Mr. Wilson favored the new doctrine of the "paramount judiciary" as a safe check upon legislation, for government by the people was new and the property holders were fearful of the excesses of an unrestricted Congress.

The attempt was to get the judicial veto into the federal Constitution in its least objectionable shape, by submitting the acts of Congress to the court before the final passage of an act, but even this failed, for, though four times presented by these two very able and influential members, this suggestion of a "judicial veto" at no time received the votes of more than one-fourth of the states. There can be no doubt that if such power had been inserted, the Constitution would never have been ratified by the several states.

It is true that the Constitution does prescribe that the Constitution of the United States and the acts passed under the authority thereof, shall be supreme over the state constitutions and laws. This is necessary in any federal government. This

does not, however, confer upon the Supreme Court the power to set aside acts of Congress, like the Income Tax Act and other statutes, not involving the boundary line between state and federal jurisdiction. The very fact that this provision was put into the federal Constitution shows that the Convention did not intend to confer upon the court the unlimited power claimed later under the doctrine of Marbury *v.* Madison. Aware of this defect, the court since the War has sought to found its jurisdiction to nullify legislative action upon the Fourteenth Amendment. It has been well said that that amendment, which was intended for the protection of the negro, has failed entirely in that purpose, but has become a very tower of strength to the great aggregations of wealth. Not only no force can be justly given to the construction placed by the Supreme Court upon the Fourteenth Amendment, from the knowledge of the history of its adoption, but the words used can not fairly be interpreted as they have been. "Due process of law" means the orderly proceeding of the courts, and the "equal protection of the laws" was never intended to give to the federal courts irreviewable supremacy over Congress and the president.

It is not too much to say that the ingenious reasoning in Marbury *v.* Madison and the construction placed upon the Fourteenth Amendment have had the same origin in the desire of the Supreme Court to amplify its jurisdiction, and in the desire of the great interests to hold the courts as a shield between them and the action of Congress and the legislatures when they have not succeeded in defeating legislation by fair means or foul.

But as a last resort, it is urged, must not Congress and the legislatures obey the Constitution? Most certainly. The members take an oath to do so, and there is as much patriotism and, considering the larger size of legislative bodies, a greater aggregate intelligence in them than in the courts. But it does not follow that if a legislature, or Congress, misconceives or violates the Constitution, the courts have the power to nullify their action. The only supervising control of the legislative body given by the constitutions is the veto of the executive, not of the courts, and that executive veto is only suspensive. If the legislature still insists, the supervising power is in the people

in the election of senators and representatives who will put a more correct construction on the Constitution.

It must be remembered that there is no line in the Constitution which gives the courts, instead of the people, supervision over Congress or the legislature. There is no constitutional presumption that five judges will be infallible and that four will be fallible. If the legislative and executive departments of the government err the people can correct it. But when the courts err, as they frequently do—for instance, as in Chisolm *v.* Georgia, in the Dartmouth College case, or in the Income Tax case, not to mention others—there is no remedy except by the long, slow process of a constitutional amendment or by a change in the personnel of the court, which is necessarily very slow when the judges hold for life as they do in the federal courts.

No one has ever questioned the ability and integrity of Chief Justice Marshall. Like other men, he saw the world from his own standpoint and from his environment and with the prepossessions of his day. He had small faith in the capacity of the people for self-government. He believed in a strong central government and distrusted the states. He believed that the function of government was the protection of property rights, which he thought jeopardized by the rule of the people, who were mostly without property. At that time the experiment of popular government was untried and the people were uneducated. Moreover, he was a strong man, rugged and earnest, and like most strong men he annexed all the jurisdiction he could lay hands upon. While his course upon the bench was in many respects of inestimable good, in such decisions as Marbury *v.* Madison, the Dartmouth College case, and others, he went beyond the necessities of the occasion and certainly beyond, far beyond, the authority conferred on the courts by the Constitution. Smaller men have extended his doctrines to their logical conclusion in more recent cases which have alarmed the public conscience, and a restoration of the jurisdiction of the court to its true limits is a necessity. As that jurisdiction has been defined in more recent cases, all legislation now depends for its validity, not upon the will of the people as expressed through

Congress and state legislatures, but upon the economic views of five lawyers, to whom "due process of law" and "equal protection of the laws" mean simply what they believe is for the real good of the people. In their hands the power of the courts over legislation is neither more nor less than an irreviewable veto upon any expression of the public will that does not meet their approval.

Let us go "back to the Constitution" as it is written. Let Congress and the legislatures legislate; subject to the only restriction conferred by the Constitution—the suspensive veto of the executive—and with further supervision in the people alone, who can be trusted with their own government—else republican form of government is a failure.

Under our plan of government the people alone are sovereign. Judges, governors, presidents, members of legislatures and members of Congress are all alike servants of the people. No right is given in any constitution to either department to supervise the action of the others. The sole supervisional authority is in the people. It has nowhere been given to the courts.

The love of us lawyers for precedent, and a feeling of professional pride that five lawyers on the Supreme Court can say to the other departments of the government, nay, to the people themselves, as has been asserted, "Thus far shalt thou go, and no farther," appeal to us. But this is the *defiance* of the servant to the master, the challenge of the creature to its creator.

There is no room in a republican form of government for "judicial hegemony."

Walter Clark.

RALEIGH, N. C.